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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 324

BERLON S. TAYLOR, PETITIONER

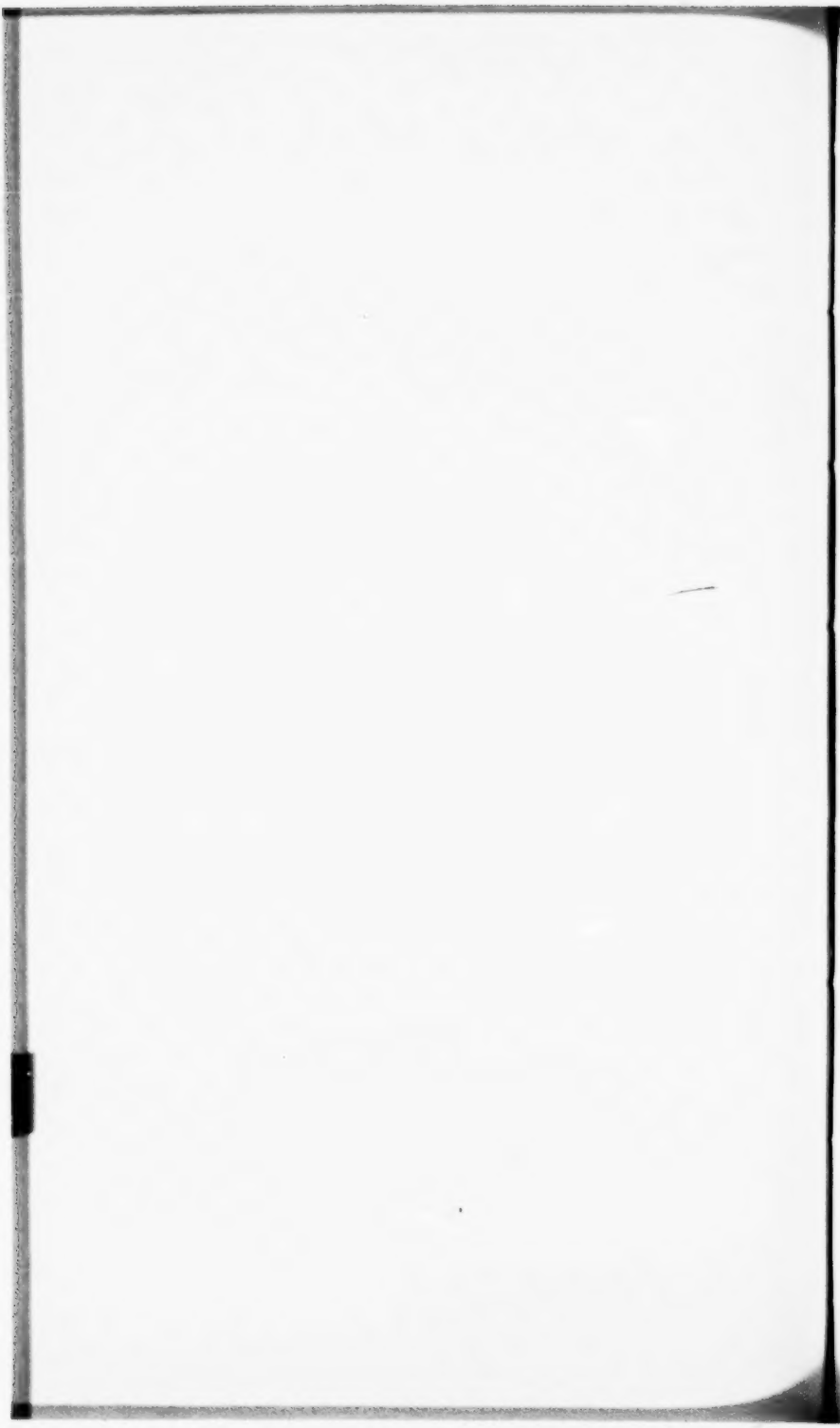
vs.

CITY OF PINE BLUFF (Arkansas), RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

KENNETH COFFELT,
902 Rector Building,
Little Rock, Arkansas,
Attorney for Petitioner.

ARK. DEMO CO., PINE BLUFF, ARK.



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CITY OF PINE BLUFF (Arkansas), RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioner prays that a writ of certiorari issue to review the majority decision of the Supreme Court of Arkansas, of April 30, 1956, and the order of the court denying re-hearing May 21, 1956, which decision and order denying re-hearing affirmed judgments of the Circuit Court of Jefferson County, Arkansas, entered

DEC 1 1956

OPINIONS BELOW

The majority opinion of the Supreme Court of Arkansas sought to be reviewed herein, is officially reported in the Arkansas Law Reporter the week following April 30, 1956. That opinion is reprinted in an Appendix to this petition at pages 6 to 9. The minority opinion is reprinted in an Appendix to this petition at pages 10 to 13. The order of the Arkansas Supreme Court denying re-hearing is reprinted in an Appendix to this petition at page 13.

JURISDICTION

The judgments of the Circuit Court of Jefferson County, Arkansas, were entered December 1, 1955. (R. 11). Judgments were affirmed by the Supreme Court of Arkansas, April 30, 1956. Re-hearing was denied by the Supreme Court of Arkansas May 21, 1956. (R. 50). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTION PRESENTED

Whether there has been purposeful discrimination against petitioner in violation of his rights under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is the owner and operator of a small grocery store in Pine Bluff, Arkansas. Respondent is the City of Pine Bluff, where petitioner resides and runs his business. In Pine Bluff, numerous types and kinds of businesses habitually remain open on Sundays with police approval, in violation of Sec. 41-3802 of Arkansas Statutes, which makes it unlawful for any business to be open on Sunday. (R. 23 and 24). The officers of the Police Department of Pine Bluff began arresting petitioner weekly for keeping his grocery store open on Sunday in violation of said state statute. They arrest no one for this violation except grocerymen. Seven charges against petitioner were consolidated and tried together in the Circuit Court of Jefferson County. He was convicted on all seven counts, and appealed to the Supreme Court of Arkansas, and the judgments of conviction were affirmed by a divided Court. The question presented there is the question presented here.

ARGUMENT

The decision sought to be reviewed deprives petitioner of his rights under the Fourteenth Amendment to the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U. S. 356; *Tarrance v. Florida*, 188 U. S. 519; *Snowden v. Hughes, et al*, 321 U. S. 1, 64 S. Ct. 397; *Queenside Hills Realty Co., Inc. v. Saxl. Com'r of Housing and Building of City of New York*, 328 U. S. 80, 66 S. Ct. 850; *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U. S. 350, 38 S. Ct. 495; *Raymond v. Chicago Union Tea Co.*, 207 U. S. 20, 28 S. Ct. 7. The Arkansas Statute involved is valid, because on its face it is not discriminatory for it prohibits every kind of business from staying open on Sunday. It applies alike to

all businesses. The Arkansas Legislature has not seen fit to discriminate against operators of grocery stores. The petitioner is not prosecuted under any city ordinance, but for his violation of the State Statute. The police force of Pine Bluff is purposely, and upon direct orders, enforcing this statute against petitioner and operators of grocery stores alone, and openly and defiantly refusing to enforce the law against any other class of business. (R. 23 and 24). The fallacy of the majority opinion appealed from is to be found in its conclusion. "It is our conclusion that a Sunday law applying only to grocers would be valid and that therefore the appellant is entitled only to be treated in the same manner as other grocers. The trial court correctly refused the defendant's offer of proof." But the fact is, there is no Sunday law in Arkansas applying only to grocers, which would entitle petitioner to be treated only in the same manner as other grocers. Without such a law he is entitled to be treated in the same manner as all other business men. The weakness of the majority reasoning upon which the decision is based is apparent. In other words, the majority decides this case on what they infer their decision would be if Arkansas had a statute prohibiting grocerymen alone from keeping their stores open on Sunday. But the Arkansas court has never upheld any such act or ordinance. In fact, in *City of Hot Springs v. Gray*, 215 Ark. 243, 219 S. W. 2nd 930 their holding was directly opposite. Whether the Arkansas court would now reverse itself when the issue is squarely presented in the face of Sec. 18, Art. II of the Arkansas Constitution, remains to be seen. Any Arkansas statute or ordinance that might in the future be passed which would single out any business and prohibit it alone from remaining open on Sunday, we think would violate this State Constitutional provision. The Pine Bluff police force has taken it upon themselves to single out, and arrest,

grocerymen alone, without legal authority. They are doing that which the legislature has not authorized them to do, and they are purposely doing that which we think the legislature cannot and will never authorize them to do. *City of Hot Springs v. Gray*, 215 Ark. 243, 219 S. W. 2nd 930; *Sec. 18 of Art. II Ark. Const.*

The Pine Bluff police force is deliberately invading petitioner's rights under the equal protection clause of the 14th Amendment, by deliberately enforcing a valid statute discriminatorily.

Petitioner contends that the minority opinion of the Arkansas Supreme Court is correct; that the majority opinion is clearly wrong and permits the violation of petitioner's constitutional rights as herein expressed. For the administrative officers of the state, or City of Pine Bluff is in this case, to take it upon themselves to inflict such discrimination on petitioner without legal authority, is clearly contrary to the plain provision of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH COFFELT,
Attorney for Petitioner.

APPENDIX

MAJORITY OPINION OF THE SUPREME COURT OF ARKANSAS

Opinion delivered April 30, 1956

The appellant was charged with having kept his grocery store open on seven separate Sundays, in violation of state law. Ark. Stats. 1947, § 41-3802. The trial court directed a verdict of guilty upon each count, as is permissible in a misdemeanor case when the proof of guilt is undisputed and the punishment is by fine alone. *Huff v. State*, 164 Ark. 211, 261 S. W. 654. The jury assessed the minimum fine of $25 for each offense.

The appellant's principal contention is that the Pine Bluff police are enforcing the statute with such discrimination as to deny to the appellant the equal protection of the laws. The trial court rejected the appellant's offer to prove that, pursuant to a policy adopted by the mayor or the city council, the police have singled out grocery stores in the enforcement of the Sunday law. According to the proffered evidence the police arrest everyone who operates a grocery on Sunday, but they allow business to be done on that day by such concerns as drug stores, hotels, filling stations, restaurants, funeral homes, bakeries, tourist courts, bus stations, city park concessions, and sporting goods stores. It is argued that this proof should have been admitted and would have established a defense to the charges.

Needless to say, the mere fact that a law is not strictly enforced in every instance is not ordinarily a defense in a criminal case. The accused cannot as a general rule escape punishment by proving that someone else has committed the same offense with impunity. Nevertheless, it was

settled by the decision in *Yick Wo v. Hopkins*, 118 U. S. 356, that purposeful discrimniation in the enforcement of an ostensibly fair law may violate the constitution. If the unlawful administration of the statute results "in its unequal application to those who are entitled to be treated alike," there is a denial of equal protection. *Snowden v. Hughes*, 321 U. S. 1.

Thus the question is whether the Fourteenth Amendment requires that Sunday laws apply alike to grocery stores and to the other businesses mentioned in the appellant's offer of proof. In other words, if the state statute applied by its terms to grocery stores alone, would it be valid?

This question would not receive the same answer in all jurisdictions. The problem has often arisen in connection with statutes and ordinances containing enumerated exceptions to the general prohibition against the doing of business on the Sabbath. All courts agree that some classification is permissible under the equal protection clause and under similar guaranties in state constitutions, but there is no uniformity of opinion as to the exact point at which classification becomes so unreasonable as to be arbitrary.

In some states the issue of discrimination has been tested on the basis of the various commodities that can or cannot be lawfully sold on Sunday. According to this view if one merchant is allowed to sell a certain article on the Sabbath the same privilege must be granted to everyone else. Consequently grocers have been successful in attacking laws that allow drug stores to operate on Sunday, merely by showing that grocery stores and drug stores sell at least a few of the same items. *Allen v. City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141; *Ex parte Hodges*, 65

Okla. Crim. 69, 83 P. 2d 201. In what is perhaps an extreme example of this view it was held that the owner of a monument works could challenge as discriminatory a law that allowed cemeteries to conduct business on Sunday. *Gaetano Bocci & Sons Co. v. Town of Lawndale*, 208 Calif. 720, 284 P. 654.

It does not seem to us that the equal protection clause restricts the legislature to classifications based on the type of commodity being sold. The legislature might reasonably believe that it is necessary and desirable to allow pharmacists to fill prescriptions on Sunday. It might also find that druggists are unwilling to open their stores for that limited activity alone and that medicines can be made available to the public on Sunday only by permitting all departments of the drug stores to remain open. Hence it does not necessarily follow that because the druggist sells a bar of soap on Sunday the grocer has a constitutional right to do the same. A study of the cases indicates that to test discrimination solely on the basis of the article sold is apt to result in abolishing all exceptions to Sunday laws, for businesses are tending more and more to overlap one another's activities.

We prefer to give full effect to the presumption of constitutionality that attends every statute and to uphold the statutory classification in the absence of proof indicating that there is no reasonable basis for the distinctions laid down by the legislature. Under this view, which prevails in many jurisdictions, Sunday laws applicable only to grocery stores and meat markets have been held to represent a reasonable classification. *People v. DeRose*, 230 Mich. 180, 203 N. W. 95; *State v. Somberg*, 113 Neb. 761, 204 N. W. 788; see also *Theisen v. McDavid*, 34 Fla. 440, 16 So. 2d 321 *State v. Towery*, 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed, 347 U. S. 925. It is our conclusion

that a Sunday law applying only to grocers would be valid and that therefore the appellant is entitled only to be treated in the same manner as other grocers. The trial court correctly refused the defendant's offer of proof.

Two remaining contentions may be answered quickly. It is said that the appellant was prejudiced by a remark made by the city attorney in his opening statement to the jury. Apart from the fact that the court admonished the jury not to consider the remark, the argument is refuted by the fact that the court directed verdicts of guilty, leaving only the matter of the punishment to the jury. Since the jury imposed the minimum fine in each case the appellant cannot have been harmed.

We are also urged to declare as a matter of common knowledge that public necessity requires grocery stores to be open on Sunday. We do not know this to be true; rather to the contrary, in many communities such stores are closed on Sunday without apparent detriment to the public welfare. Moreover, the statute puts the issue of necessity on an individual basis, as it provides that "necessity on the part of the customer" may be shown as justification for commercial activity on the Sabbath. Ark. Stats., § 41-3803. It may be doubted whether this exception was meant to permit business as usual on Sunday, without regard to the needs of any particular person.

Affirmed.

Robinson, J., dissents.

MINORITY OPINION OF THE SUPREME COURT OF ARKANSAS

Justice Sam Robinson, Dissenting

I dissent for the reason that, in my opinion, there has been purposeful discrimination against the appellant in violation of his rights under the Fourteenth Amendment to the Constitution of the United States. Appellant was convicted of violating Ark. Stats. § 41-3802 by keeping his grocery store open on Sundays. The statute provides: "Every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingrees (ingress) or egrees (egress), or retail or sell any spirits or wine, shall, on conviction thereof, be fined in any sum not less than twenty-five ($25.00) dollars, nor more than one hundred dollars ($100.00)." Thus, it will be seen that it is a violation of the law to keep open *any store or retail any goods, wares and merchandise on Sunday.*

Amendment No. Fourteen to the Constitution of the United States provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The sole question here is whether the appellant has been denied that protection. The statute prohibiting the sale on Sunday of goods, wares and merchandise, on its face, is fair and no contention is made that it is invalid; but the manner of enforcement is in violation of the Fourteenth Amendment. Although a law is fair on its face and impartial in appearance, yet, if it is applied and administered in an unequal manner it is within the prohibition of the Constitution.

In *Yick Wo v. Hopkins*, 118 U. S. 356, the court said: "The discrimination is, therefore, illegal, and the public

administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution." Although the statute prohibits the sale of *any goods, wares or merchandise* on Sundays, the law enforcement officers are permitting other places of business to remain open and are allowing the barter and sale of almost every known kind of merchandise, except groceries.

It was held in *Tarrance v. Florida*, 188 U. S. 519, that an actual discrimination is as potential in creating a denial of equal rights as a discrimination made by law. A large latitude is allowed to the states for classification upon any reasonable basis and what is reasonable is a question of practical details into which fiction cannot enter. *Kidd v. Alabama*, 188 U. S. 730. In the absence of any showing of reasonable basis for the discrimination by the administrative officers, as here, the court has no right to conjure up possible situations which might justify the discrimination. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266. Discriminations are not to be supported by mere fanciful conjecture and cannot stand as reasonable if they offend the plain standards of common sense. "That is to say *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Hartford Steam Boiler Inspection and Insurance Company v. Harrison*, 301 U. S. 459.

Drug stores are permitted to stay open on Sunday and it is a matter of common knowledge that they sell a

large assortment of merchandise. In fact, variety or department stores would be more appropriate names; they sell all kinds of goods, including home appliances and wearing apparel. We know that sporting goods stores, also allowed to do business on Sunday, sell guns and ammunition, fishing tackle, boats and motors, shoes, boots, clothing, stoves, electrical appliances, and almost everything a person needs for hunting, fishing and outdoor activities. Bakeries are permitted to remain open, and we know that they sell practically nothing that is not sold in grocery stores. Certainly there is nothing obnoxious about the grocery business that would justify discrimination; in fact, such discrimination; in fact, such discrimination as is shown here cannot be justified on any reasonable basis. And although classification is permitted without denying the equal protection of the laws, a classification based on no adequate reason is invalid. *Kansas City Southern Railway Co. v. Road Improvement District No. 6 of Little River County, Arkansas*, 41 S. Ct. 604, 256 U. S. 658, 65 L. Ed. 1151, reversing 139 Ark. 424. The Supreme Court of the United States said, in *Power Co. v. Saunders*, 274 U. S. 490, reversing 169 Ark. 748: "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, *Truax v. Corrigan*, 257 U. S. 312, 333; *Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg*, 238 U. S. 56, 59, and extends as well to corporate as to natural persons, *Smyth v. Ames*, 169 U. S. 466, 522; *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 154; *Santa Clara County v. Southern Pacific R. R. Co.*, 118 U. S. 394, 396. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real

and substantial difference having a reasonable relation to the subject of the particular legislation. *Truax v. Corrigan, supra,* p. 337; *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, supra,* 155; *Lindsley v. Natural Carbonic Gas. Co.,* 220 U. S. 61; 78; *Ft. Smith Light & Power Co. v. Board of Improvement, ante,* p. 387."

The legislature of the state has not seen fit to discriminate against grocery stores by placing them in a category separate and apart from other mercantile establishments, and provide that they must remain closed on Sundays while other places of business are permitted to remain open; and for the administrative officers of the state to take it upon themselves to inflict such discrimination is clearly contrary to the plain provisions of the Fourteenth Amendment. Hence, I respectfully dissent.

IN THE

SUPREME COURT OF ARKANSAS

May 21, 1956

November Term, 1955

Rehearing Petitions Denied:

The petitions for rehearing in the following cases are denied:

4839. Berlon S. Taylor v. City of Pine Bluff

(R. 50)

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BERLON S. TAYLOR, PETITIONER

vs.

CITY OF PINE BLUFF (Arkansas), RESPONDENT

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

WILTON E. STEED,
City Attorney for the
City of Pine, Bluff, Arkansas.

ARK. BRIEF CO., PINE BLUFF, ARK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

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CITY OF PINE BLUFF (Arkansas), RESPONDENT

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Respondent prays that the petition for a writ of certiorari to review the opinion of the Supreme Court of Arkansas be denied.

ARGUMENT

The decision sought to be reviewed does not deprive petitioner of his rights under the Fourteenth Amendment to the Constitution of the United States.

The authorities relied upon by petitioner for a review of the Arkansas Supreme Court's decision are all cases involving discrimination within the class.

In fact, Yick Wo vs. Hopkins, 118 U. S. 356 involves a native of China who was still a subject of the Emperor of China, that had been in the laundry business in the same wooden building for twenty-two years. After twenty-two years the board of supervisors refused to issue a permit to Yick Wo to operate his laundry. There were about three hundred and twenty laundries in San Francisco, of which two hundred and forty were owned and operated by subjects of China. All the Chinese subjects were denied a permit to operate a laundry in wooden buildings while eighty persons who were not Chinese were granted permits to operate in wooden buildings. The ordinance in question provided in substance that no person or persons shall maintain or carry on a laundry without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

Clearly there is purposeful discrimination in the enforcement of the ordinance in the above styled case; however, in the case at bar there is no racial question involved. Petitioner is the only grocery store open in Pine Bluff on Sunday. There is no one in the grocery business in Pine Bluff, Arkansas, permitted to open on Sunday. Everyone operating a grocery store is treated alike.

The case of City of Hot Springs vs. Gray, 215 Ark. 243, 219 S. W. 2nd 930 cited by petitioner pertains to a city ordinance which was passed permitting all grocery stores

to remain open providing they had no more than two employees. All other grocery stores could not open. This is clearly discrimination within the class.

Petitioner is the only operator of a grocery store that is open on Sunday, and he is trying to obtain a franchise on Sunday in violation of the Arkansas Law.

Statutes prohibiting the keeping open of stores on Sunday, but exempting drug stores held not invalid. Brunswick Balke-Collander Co. vs. Evans, 39 S. Ct. 5, 248 U. S. 587. The decision of the Arkansas Supreme Court is based on this case which is the governing law of the land.

CONCLUSION

Respondent contends that the majority opinion of the Arkansas Supreme Court is correct. The Arkansas Supreme Court decided the question of discrimination in accordance with applicable decisions of this Court and therefore the petition should be denied.

Respectfully submitted,

WILTON E. STEED,
City Attorney for the
City of Pine, Bluff, Arkansas.